



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

October 23, 1995

Mr. Richard D. Monroe  
Deputy General Counsel  
Texas Department of Transportation  
Dewitt C. Greer State Highway Bldg.  
125 E. 11th Street  
Austin, Texas 78701-2483

OR95-1116

Dear Mr. Monroe:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 19468.

The Texas Department of Transportation (the "department") has received a request for "access to, review of, and copying of all information including any written reports to Nacogdoches County on the [bridge over Naconiche Creek on County Rd. 280] and the adjoining roadways." You have submitted for our review certain bridge inspection records you inform us are responsive to the request for information.<sup>1</sup> You contend this information is excepted from disclosure under section 552.101 of the Government Code.

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You state that the requested information "consists of inspections of 'off system' [bridges not on the department highway system] bridges" and that "[t]hese inspections are performed pursuant to 23 USC Sec. 144." You contend that the inspections are confidential under section 409 of title 23 of the United States Code which provides:

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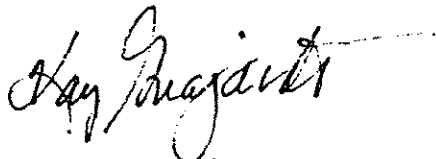
<sup>1</sup>We note that you state that all other information responsive to the request for information has been released to the requestor.

Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds *shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.* [Emphasis added.]

Section 409 deals specifically with court proceedings. The information is protected from "discovery" or from being "admitted into evidence" in state or federal court, or from being "considered for other purposes in any action for damages." While section 409 protects the department from producing the report in a lawsuit or having the report used as evidence against it in a lawsuit, it does not prohibit the department from releasing the reports, or make the information confidential outside of the litigation context. Open Records Decision No. 561 (1990), upon which you rely, dealt with information which was expressly confidential under federal law, and is therefore distinguishable. Open Records Decision No. 561 (1990) at 7; *see also* Attorney General Opinion JM-830 (1987) (state agencies must have *specific* authority under state or federal law to make information confidential). Furthermore, this office has determined that section 552.101 does not cover discovery privileges. *See* Open Records Decision No. 575 (1990). Accordingly, you may not withhold the information under section 552.101 of the Government Code.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in dark ink, appearing to read "Kay Guajardo", with a horizontal line extending to the right.

Kay H. Guajardo  
Assistant Attorney General  
Open Records Division

KHG/LBC/rho

Ref.: ID# 19468

Enclosures: Submitted documents

cc: Mr. Bill McWhorter  
Landmark Center, Suite A  
119 North Street  
Nacogdoches, Texas 75961  
(w/o enclosures)